IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

RSA.No. 296 of 2007()

(AGAINST THE JUDGMENT DATED 22.11.2006 IN AS.317/2006 ON THE FILES OF THE DISTRICT JUDGE, ERNAKULAM WHICH IN TURN AROSE FROM THE JUDGMENT DATED 10.1.2002 IN OS.111/1999 of THE MUNSIFF COURT, PERUMBAVOOR)

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APPELLANT/APPELLANT/PLAINTIFF:

JOY VARGHESE, S/O.VARKEY,
CHIRAKKUDY HOUSE, RAYAMANGALAM KARA,
RAYAMANGALAM VILLAGE.

BY ADV. SRI.V.GIRI

RESPONDENTS: RESPONDENTS/PLAINTIFFS:

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1. **VARKEY,S/O.VARKEY, CHIRAKKAKUDY HOUSE, RAYAMANGALAM KARA, RAYAMANGALAM VILLAGE.**
2. **C.V.VARKEY, CHIRAKKAKUDY HOUSE, RAYAMANGALAM KARA, RAYAMANGALAM VILLAGE.**
3. **ACHAMMA, W/O KURIAN MATHEW, THELAKATHU VEEDU, AAYIKKARANADU, THRIKKARIYOOR VILLAGE, KOTHAMANGALAM TALUK, THRIKKARIYOOR P.O.**
4. **ELIYAMMA, W/O.ABRAHAM THARIYAN, AREEKAL VEEDU, MEKKADUKARA, NEDUMBASSERY VILLAGE, ALUVA TALUK, VAPPALASSERY P.O.**

...2/-

5. MARY, W/O.DR.GEORGE,
KANJIRATHINKAL VEEDU, MUDAKKUZHA KARA,
VENGOOR VILLAGE, MUDAKUZHA P.O.

6. ALEX, S/O.LATE ANNAMMA GEORGE &
FATHER GEORGE, KATTAKKAYAMVEDU, VALAMBOOR KARA,
PATHINATTOM VILLAGE, KUNNATHUNAD TALUK,
KADAYIRIPPU P.O.

7. ABY, S/O.LATE ANNAMMA GEORGE &
FATHER GEORGE, KATTAKKAYAM VEEDU,
VALAMBOOR KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK, KADAYIRIPPU P.O.

8. AJU, S/O. LATE ANNAMMA GEORGE &
FATHER GEORGE, KATTAKKAYAM VEEDU, VALAMBOOR KARA,
PATTIMATTOM VILLAGE, KUNNATHUNADU TALUK,
KADAYIRIPPU P.O.

BY ADV. SRI.P.SANJAY)
SMT. A. PARVATHY MENON) for R2

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 296 OF 2007

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Dated this the 2nd day of July, 2007

JUDGMENT

Appellant is the plaintiff and respondents the defendants in O.S.111/1999 before Munsiff Court, Perumbavoor. The suit was filed to set aside cancellation of deed dated 17.12.1977 and sale deed dated 16.11.1998 and for a permanent prohibitory injunction. Out of the court payable only Rs.1610/-,being the 1/10th of the total court fee was paid. Respondents filed the written statement on 15.3.2001. Issues were settled on 8.8.2001. Though appellant was directed to pay the balance court fee and suit was posted for further steps to 24.10.2001, balance court fee was not paid. On 24.10.2001 suit was posted to 10.1.2002 for pretrial steps if any and remittance of balance court fee. On that day recording that balance court fee was not paid as directed, suit was rejected under Rule 11 of Order VII of C.P.C.

Appellant challenged the rejection of the plaint before Sub Court, North Parur. Appeal was later transferred to District Court, Ernakulam. In the first appeal it was contended by the appellant that his counsel wrongly noted the posting date as 20.1.2002 instead of 10.1.2002 and only on 20.1.2002 when the suit was not called, the rejection of the plaint was known to the appellant and therefore balance court fee could not be remitted before the suit was rejected and hence the order rejecting the plaint is to be set aside and appellant is to be permitted to pay balance court fee. Learned District Judge dismissed the appeal holding that sufficient time was granted to pay the balance court fee and as it was not remitted, the rejection of the plaint was justified. It is challenged in the Second Appeal.

2. The second appeal was admitted formulating the following substantial questions of law.

A. Can a plaint be rejected for non-payment of balance court fee in terms of Section 4A of the Court Fees and Suits Valuation Act, after framing of the issues and if the plaintiff is not present when the case was called, is it not a case where the suit can only be dismissed for default.

B. Has not the first appellate court misconstrued the scope and ambit of decision in Varghese v. Devi Academy (1999(1) KLT 440) and also the scope and ambit of Section 149 of the CPC which confers power on the court to grant extension to do any act which is required to be done by the party?

C. Are not the courts below entitled to extend time for payment of balance court fee in circumstances where there is no material whatsoever to hold that a party has been willfully negligent in payment of the balance court fee?

3. Learned counsel appearing for appellant and

respondents were heard.

4. Though learned counsel appearing for appellant argued that suit should have been dismissed for default instead of rejecting the plaint on 10.1.2002 as the plaintiff was absent, the proceeding paper of the trial court does not show that neither plaintiff nor his counsel was absent. The proceedings on 10.1.2002 only shows that balance court fee was not remitted as directed and sufficient opportunity was granted and still it was not remitted and therefore plaint is rejected. As the proceeding paper does not show that the plaintiff was absent and he was not represented by the counsel, suit could not have been dismissed for default.

5. Under section 4A of Kerala Court Fees and Suit Valuation Act, balance court fee is to be paid not later than 15 days from the date of framing of issues. The proviso enables the court,

for sufficient reasons to be recorded in writing, to extent the period upto 30days. Appellant did not pay the court fees within 15 days from the date of framing of the issues or within 30 days thereafter. In such a case court is competent to reject the plaint as provided under Rule 11 of Order VII of Code of Civil Procedure. This aspect has been settled by the Division Bench of this Court in **Mable v. Dolores (2001 (2) KLT 612).** This court held:-

> "The power under O.VII R.11 of the Code, whether it be C1.(b) or Cl.(c) inhers in the court, the moment the plaint is filed. But, in view of the introduction of S.4A in the Kerala Court Fees and Suits Valuation Act, the power under Cl.(c)

of O.VII R.11 is under eclipse for the time specified by S.4A of the Court Fees and Suit Valuation Act. S.4A of the Court Fees Act specifically provides that while filing the plaint, the plaintiff need not pay the entire court fee as per the valuation shown in the plaint and need only pay one-tenth of the court fee. It further provides that the balance court fee has to be paid within 15 days of the settlement of issues. The court has the power to extend the time upto 30 days

from the date of settlement of issues for sufficient reasons to be recorded in writing. It is during this period that the power of the court under O.VII R.11(c) of the Code remains suspended. The moment the 15 days period is over in terms of S.4A of the Court Fees Act, the power of the court revives and the court is entitled to act in terms of O.VII R.11(c) of the Code of Civil Procedure. In other words, the power under O.VII R.11 of the Code comes out of the eclipse. In this case therefore, the trial

> court was entitled to reject the plaint on the expiry of 15 days from 13.1.1995. The court, as a matter of fact, rejected the plaint only on 27.11.1996, more than one year and 10 months of the date of settlement of issues."

Therefore trial court is competent to reject the plaint under Rule 11 of Order VII.

6. But the question is whether appellant is to be permitted to pay the balance court fee, to enable him to contest the suit. Considering the fact that according to appellant he did not pay the balance court fee, which he was directed to be remitted on or before 10.1.2002, as his counsel has recorded a wrong date of posting, in the interest of justice, appellant is to be permitted

to remit the balance court fee; so that a decision could be arrived at by the court on merits. But it could only be within a fixed period.

7. Appeal is allowed. The order dated 10.1.2002 rejecting the plaint under Rule 11 of Order VII in O.S.111/1999 will stand set aside, if appellant remits the balance court fee before the trial court on or before 20.7.2007. If the balance court fee is so remitted, learned Munsiff to restore the suit and proceed with the suit and dispose it on merits. If the balance court fee is not remitted as directed, the order rejecting the plaint will stand. Send back the records forthwith.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006